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No. 1166

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In the
Supreme Court of the United States

TERM, 19____

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Petitioner,

v.

TEXAS GAS EXPLORATION CORPORATION,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TEXAS GAS EXPLORATION CORPORATION,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Collector of Revenue for the State of Louisiana, Ashton J. Mouton, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, in Number 23,403, *Texas Gas Exploration Corporation, et al. v. Ashton J. Mouton, Collector of Revenue, State of Louisiana.*

1.

This case and the case of "*Collector of Revenue, State of Louisiana v. Mississippi River Fuel Corporation, et al.*", are identical as to the issues and the legal questions involved. The original complaints in both cases are almost identical in language. The facts stipulated in the Mississippi River Fuel case and the pre-trial order in the Mississippi River Fuel case were made the stipulation and pre-trial order, with minor changes, for trial of this case. By motion of counsel

the briefs filed in the Mississippi River Fuel case in the Court of Appeals for the Fifth Circuit were adopted as the briefs in the instant case. Argument on the Mississippi River Fuel case before the District Court and before the United States Court of Appeals for the Fifth Circuit were the arguments in the case. At no time has the instant case been considered separately from the Mississippi River Fuel case.

2.

Simultaneously with this case an application for a writ of certiorari to this court is being made in the Mississippi River Fuel case which is entitled as shown in paragraph one above. The opinions of the Courts below in the Mississippi River Fuel case are applicable to this case. The opinions are fully reported in the appendix of the application for certiorari in the Mississippi River Fuel case. If statements of Jurisdiction, Questions presented for Review, Statutes and Regulations Involved, Statement of Facts and Argument were included in this case they would be the same as those in the Mississippi River Fuel case.

3.

The two cases were considered together for rehearing by the Court of Appeal for the Fifth Circuit and the Stays of the Mandate to enable petitioner in both cases to apply for writs to this Court were issued the same day.

4.

The judgment in the District Court, the judg-

ment of the Court of Appeals for the Fifth Circuit, the Stay of the Mandate and the title page of the opinion of the Court of Appeals for the Fifth Circuit are reproduced in the Appendix herein.

WHEREFORE, petition prays: That this application for a writ of certiorari be considered as one with the application for writ of certiorari this day filed in the case entitled, "*Collector of Revenue, State of Louisiana, v. Mississippi River Fuel Corporation, et al.*" and that a writ of certiorari issue herein.

Respectfully submitted,

s/ Emmett E. Batson

EMMETT E. BATSON,
Counsel of Record.

CHAPMAN L. SANFORD
JOHN B. LEVY
CYRUS A. GRECO

Attorneys for Petitioner
Legal Division,
Department of Revenue
State of Louisiana
P. O. Box 201, Capital Station
Baton Rouge, Louisiana

CERTIFICATE OF SERVICE

I, EMMETT E. BATSON, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing petition with appendicies on the Solicitor General of the United States and on each of the attorneys of record of the respondents as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Feb. 22, 1968

/s/ Emmett E. Batson
EMMETT E. BATSON,
Counsel of Record.

Solicitor General of the United States,
Department of Justice,
Washington, D. C. 20530.

EDWIN L. WEISEL, JR.,
ROGER P. MARQUIS,
Attorneys for Amicus Curiae,
Department of Justice,
Washington, D. C. 20530.

CLARENCE L. YANCEY,
600 Commercial National Bank Building,
Shreveport, Louisiana.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23,402

MISSISSIPPI RIVER FUEL CORPORATION, ET AL,
Appellants,

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Appellee.

No. 23,403

TEXAS GAS EXPLORATION CORPORATION,
Appellant,

v.

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(January 8, 1968.)

NOTE: Opinion is in application of writs of Certiorari in Mississippi River Fuel Case above.

APPENDIX B

(Title and Number Omitted.)

(Filed December 3, 1965.)

Judgment of District Court

This cause came before the Court, Honorable E. Gordon West, District Judge, for determination on the record, and the Court having duly considered same and for the written reasons assigned and filed herein:

IT IS ORDERED AND ADJUDGED that the demands of plaintiff be, and they are hereby, rejected and that the matter be, and it is hereby, DISMISSED on the merits at plaintiff's costs.

Baton Rouge, Louisiana, December 3, 1965.

A. DALLAM O'BRIEN, JR., CLERK

BY /s/ C. H. BANTA

Deputy Clerk

NOTE: Opinion is in Mississippi River Fuel Case.

APPENDIX C

TEXAS GAS EXPLORATION CORPORATION,
Appellant,

v.

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Appellee,

No. 23,403

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
SEPT. 13, 1967

Appeal from the United States District Court for the Eastern District of Louisiana; E. Gordon West, Judge.

Clarence L. Yancey, Shreveport, La., for appellant.

Emmett E. Batson, Baton Rouge, La., for appellee.

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

PER CURIAM.:

The issues in this case are identical to those in *Mississippi River Fuel Corp. v. Cocreham*, 5 Cir., 382 F.2d 929, decided today. For the reasons expressed in our opinion in that case, the judgment is reversed.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23,403

TEXAS GAS EXPLORATION CORPORATION,
Appellant,

v.

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 16th day of January, 1968.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

(ORIGINAL FILED—JANUARY 16, 1968)

B-1265, 2-68

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

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Supreme Court, U.S.
FILED
MAR 25 1968
JOHN F. DAVIS, CLERK

No. [redacted]1166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ASHTON J. MOUTON, Collector of Revenue
of the State of Louisiana

Petitioner

vs.

TEXAS GAS EXPLORATION CORPORATION

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARENCE L. YANCEY
600 Commercial National Bank Building
Shreveport, Louisiana 71101

Counsel for Respondent

LEGONTE, SHREVEPORT, LOUISIANA

No. 1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ASHTON J. MOUTON, Collector of Revenue
of the State of Louisiana

Petitioner

vs.

TEXAS GAS EXPLORATION CORPORATION

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This brief in opposition to the petition for certiorari to the United States Court of Appeals for the Fifth Circuit is filed under Rule 24.

For the reasons set forth below, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

THIS CASE TERMINATED IN THE COURT OF APPEALS AND THE PETITION FOR CERTIORARI SHOULD NOT BE ENTERTAINED

Because no petition for rehearing was ever filed in this case in the Court of Appeals, the case terminated on October 19, 1967, when the decision by that court, granting plaintiff the relief sought, became final.

The facts and the law involved are similar to *Mouton, Collector, v. Mississippi River Fuel Corporation, et al*, No. 1165 on the docket of this court. However, the cases have never been consolidated and no action in one can affect the other directly. The two suits were filed in the district court at separate times and were tried there separately.

The district judge decided both cases the same day. Separate appeals were taken to the court of appeals and separate bonds were filed. In the court of appeals the appellant and appellee filed separate motions to have the briefs in the Mississippi River Fuel Corporation case considered as briefs in this case and an order to that effect was entered. The order also consolidated the cases for the purpose of argument only. Separate opinions and judgments were rendered in these cases, the opinion and judgment in this case making reference to the Mississippi River case.

After judgment for the plaintiffs in these cases, the defendant filed separate motions for extension of time within which to file petitions for rehearing and separate orders were entered extending this period until October

19, 1967. A petition for rehearing was filed in the Mississippi River Case but none has ever been filed in this case.

On December 26, 1967, the court of appeals issued its mandate in this case. On January 8, 1968, a rehearing was denied in the Mississippi River case and, for the first time, the caption of this order contained the style and number of both cases. The mandate in this case was recalled.

Upon this incongruity being called to the attention of the court, a Per Curiam issued on February 12, 1968, explaining the action of the court by saying that "This court treated the two cases as if they were consolidated."

It is submitted that:

1. Although the cases are similar and, in some measure, have been *companion* cases, they are not *consolidated* cases and never have been. In fact, separate petitions for certiorari are filed here.

2. When a litigant fails to file a petition for rehearing the court of appeals cannot supply this omission. Where the parties themselves have failed to consolidate cases we deny to the court the authority to consolidate without the consent of the parties.

"Consolidation" means a merger of causes of action where the cases lose their separate identity and become a single action. *George v. Leonard*, 84 F.Supp. 205, 208; *Bley v. Travelers Insurance Co.*, 27 F. Supp. 351; Words and Phrases, Vol. 8 A, page 343, verbo "Consolidate." In fact, to have true consolidation, the parties to the actions must

be the same. 1 Corpus Juris Secundum, Sec. 110, verbo "Actions."

Here, there has never been a motion for general consolidation or for consolidation for purposes of decision or rehearing. Since this case is a separate action and the Collector did not petition for rehearing the case became final, mandate should issue and this court should not consider certiorari because the question is now moot. The petition for certiorari was filed February 27, 1968, which is more than ninety days after the time when application for rehearing could have been filed in the court of appeals, so the petition here comes too late.

Alternatively, as to other grounds upon which the petition is opposed, respondent adopts as its own the arguments of the respondents in *Ashton J. Mouton, Collector of Revenue of Louisiana v. Mississippi River Fuel Corporation et al., No. 1165.*

Accordingly respondent shows that certiorari should be denied because this case terminated for failure of petitioner to apply for rehearing in the court of appeals and, in the alternative, because a state may not lawfully levy taxes on oil and gas produced and severed within a federal enclave over which Congress has exclusive jurisdiction.

Respectfully submitted,

Clarence L. Yancey
600 Commercial National Bank Building
Shreveport, Louisiana 71101

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been served upon the following counsel of record for petitioner by depositing a copy thereof in the United States mail, postage prepaid, to each:

Emmett E. Batson, Chapman L. Sanford,
John B. Levy and Cyrus A. Greco, Esqs.
403 Capitol Annex, Baton Rouge, Louisiana.

Shreveport, Louisiana, this 21st March 1968.

.....

Counsel for Respondent